BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH K. KILLINGSWORTH	)	
Claimant	)	
VS.	)	
	)	Docket No. 179,391
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals from an award on review and modification entered by Special Administrative Law Judge William F. Morrissey on May 28, 1997. The Appeals Board heard oral argument November 26, 1997.

APPEARANCES

Claimant appeared by his attorney, Chris A. Clements of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the award. The Appeals Board has also adopted the stipulations listed in the award.

ISSUES

The Special Administrative Law Judge increased claimant's award from one based upon 2.5 percent impairment of function to the body as a whole to one based upon 14 percent impairment of function to the body as a whole. Claimant contends the award should have been modified to one for work disability. The central legal question is whether

the fact claimant now earns little, if any, overtime pay should be considered in determining whether to apply the presumption of no work disability found in K.S.A. 1992 Supp. 44-510e and in determining claimant's loss of ability to earn a comparable wage, also under K.S.A. 1992 Supp. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board concludes that the award should be modified and claimant should be granted benefits based upon a work disability of 37.5 percent.

Findings of Fact

1. Claimant injured his back in an accident arising out of and in the course of his employment for respondent. The parties have stipulated to a date of accident of April 5, 1993.

2. The parties entered an agreed award granting claimant certain temporary total disability and medical benefits as well as permanent partial disability benefits for a 2.5 percent permanent impairment of function.

3. The agreed award also provided that claimant was entitled to future medical benefits upon proper application and stated that C. Reiff Brown, M.D., would be the treating physician in the event further treatment was necessary. Claimant did not waive the right to review and modification as a part of the agreed award.

4. Claimant returned to work for respondent after the injury and his back condition gradually worsened.

5. In April of 1996 claimant requested, and respondent authorized, additional treatment by Dr. Brown. Dr. Brown recommended light-duty work, medications, and a back brace.

6. In July 1996 Dr. Brown determined claimant had reached maximum medical improvement. Dr. Brown rated claimant's impairment as 14 percent impairment to the body as a whole but attributed only 6 percent to the work injury with 8 percent preexisting that injury. Dr. Brown also recommended as permanent restrictions that claimant avoid lifting over 40 pounds occasionally and 25 pounds frequently. He also recommended claimant avoid work involving frequent bending or working in a bent position for longer periods of time.

7. At the time claimant first saw Dr. Brown, claimant worked in a position as a blood operator. His position required frequent bending as well as lifting 40 to 60 pounds. Because of the restrictions recommended by Dr. Brown in July 1996, respondent had claimant tour

the plant to choose a different job. Claimant was then placed in a position as janitor on September 14, 1996.

8. The parties stipulated, as a part of the agreed award, that claimant's gross average weekly wage was $487.62. The position claimant held at the time of the injury offered frequent opportunities to earn overtime pay.

9. After the restrictions by Dr. Brown and the move to the job as a janitor, claimant earned $8.89 per hour but earned overtime pay only infrequently.

10. Claimant's gross average weekly wage in the position as janitor, calculated as 40 hours per week times $8.89 plus the average weekly overtime pay, was $374.80. This wage is calculated by multiplying 40 hours time $8.89 per hour and then adding the average overtime of the 13 weeks claimant worked from the time he switched to the janitor position to the date of claimant's deposition. The total overtime during that period was $249.63.

Conclusions of Law

1. An award may be modified when a claimant establishes that his/her disability has increased. K.S.A. 44-528 (Ensley).

2. If a claimant returns to work after the injury in an unaccommodated position at a comparable wage and benefits are based on functional impairment only because of the presumption of no work disability found in K.S.A. 1992 Supp. 44-510e, subsequent layoff will not overcome the presumption and will not entitle claimant to work disability when his/her functional impairment has not changed. Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

3. As a negative implication of the Watkins decision, if the claimant's physical condition worsens and requires claimant to change to a different job at a lesser rate of pay, a rate of pay not comparable to the preinjury wage, the presumption of no work disability no longer applies and claimant will be entitled to work disability if shown to be higher than the functional impairment. K.S.A. 44-510e.

4. When calculating the wage claimant earned in employment after the injury, for purposes of determining whether the presumption of no work disability applies, the wage in claimant's post-injury employment should be calculated the same as the pre-injury wage. Both should be calculated as required by K.S.A. 44-511. When so calculated, claimant's $374.80 per week wage in the janitor position, the position to which he was moved after his condition worsened and Dr. Brown recommended restrictions, was not comparable to the stipulated preinjury wage of $487.62. The presumption of no work disability found in K.S.A. 1992 Supp. 44-510e, therefore, does not apply.

5. At the time of claimant's injury, April 5, 1993, work disability was defined in K.S.A. 1992 Supp. 44-510e as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn a comparable wage has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation . . . .

6. To determine claimant's ability to earn wages after the accident, it is appropriate to use the wages claimant actually earns as a measure of claimant's ability to earn wages. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

7. When comparing the pre-injury wage to the post-injury wage, both should be calculated according to the provisions of K.S.A. 44-511 and for an hourly employee the average overtime is added to the base wage to arrive at the gross average weekly wage.

8. Claimant's wage at the position as a janitor of $374.80 is 23 percent less than claimant's stipulated pre-injury wage of $487.62 and claimant, therefore, has a 23 percent loss of ability to earn a comparable wage.

9. Based on the labor market loss opinions of Mr. Jerry Hardin (55-60 percent) and Ms. Karen Terrill (46 percent), the Appeals Board concludes claimant has lost, from the work restrictions of Dr. Brown, 52 percent of his ability to work in the open labor market.

10. Giving equal weight to the labor market loss and the loss of wage earning ability, the Appeals Board finds claimant has a 37.5 percent work disability and the award should be so modified as of September 14, 1996, when claimant changed jobs to the janitorial position because of the new restrictions recommended by Dr. Brown.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Special Administrative Law Judge William F. Morrissey, dated May 28, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kenneth K. Killingsworth, and against the respondent, Excel Corporation, a qualified self-insured, for an accidental injury which occurred April 5, 1993, and based upon an average weekly wage of $487.62 for 179.71 weeks at the rate of $8.13 per week for a 2.5% permanent partial disability or $1,461.04, and 235.29 weeks at $121.91 per week for a 37.5% work disability, making a total award of $30,145.24.

As of December 31, 1997, there is due and owing claimant 179.71 weeks of permanent partial disability compensation at the rate of $8.13 per week and 67.57 weeks at the rate of $121.91 for a total of $9,698.50, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $20,446.74 is to be paid for 167.72 weeks at the rate of $121.91 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director